THE BRUNSWICK SUCCESSION

The recent death of Prince Albert of Prussia, regent of the duchy of Brunswick, has served to once more bring into prominence certain political and constitutional questions severely agitated when, in 1884, the last duke of the elder branch of Brunswick-Luneburg, passed away, leaving the throne open, under the terms of ancient succession-agreements, to the younger line of the house now represented by the duke of Cumberland. This latter prince would, doubtless, have been chosen as a matter of course had not the further question of his hereditary claims upon Hanover, a province of Prussia since its incorporation by that power following the surrender at Langensalza in 1866, introduced features which have led the imperial government to deny his constitutional eligibility. The duke's father, formerly reigned over Hanover as King George V, and was a son of that Ernest Augustus, younger brother of William IV of England, who, in 1837, succeeded to the crown of Hanover, Queen Victoria being excluded from a succession vested by law in the male line. The house of Brunswick is the modern representative if the ancient Guelphs (Welfen) whose name, borne to-day by a small political faction in the Reichstag, stands for a general opposition to things Prussian, and takes practical shape in an uncompromising support of the duke's apparent design to acquire his Hanoverian family possessions. The success of such an intention would plainly constitute a serious impairment of Prussia's territorial integrity, and, in this light, it was declared by a solemn decree of the Imperial Federal Council, (Bundesrat) made July 2, 1885, to be contrary to both the treaty-agreements (Bündnisverträge) upon which the North German Confederation and the Empire are erected, and to the Imperial Constitution itself. Thus it was that the duke was passed over as a candidate until he should renounce all intention upon Hanover, and the provisional plan (Provisorium) of a regency was adopted with Prince Albert at its head. To indefinitely perpetuate such a system is regarded by the ministry and local assembly (Landtag) of Brunswick as highly undesirable; a temporary council of regency with the president of the local ministry as its chairman has therefore been placed in charge of the ducal government and the

Landtag has unanimously resolved[1] to invoke the supreme authority of the Bundesrat touching a final settlement of the entire matter. Both the duke and the Landtag agree that the imperial council is constitutionally qualified to adjust the succession, but hitherto no promise has been obtained from the duke that he will renounce his Hanoverian claim as a condition precedent to his election as sovereign of Brunswick. Prince von Bülow,—Chancellor of the Empire, chairman of the Bundesrat, and Prussian minister of foreign affairs,—has publicly declared in reply to the Landtag's written request that he bring the matter before the Council, that as *Chancellor* he must abide by the resolution of July 2, 1885, to wit, "that the installation of the duke in Brunswick is considered at war with the ground principles of the original treaties of union and with the imperial constitution;" speaking, too, as *Prussian* minister, the prince adds, that without a definite renouncement on the duke's part of all Guelphic ambitions it is directly contrary to Prussian interests that a neighboring state of the empire be placed under the government of a member of a family aiming at Prussia's disintegration.[2] In assuming these positions Chancellor Von Bülow has the unqualified support of the Kaiser who has written to his cousin the duke that the government must decline to countenance any reopening of the question by the Bundesrat.

To the student of comparative constitutional jurisprudence the feature possessing the greatest interest in a case complicated by dynastic and political aspects as well as by those purely constitutional, consists in the affirmance by the Kaiser and his chancellor of the stand taken in 1885 and which resulted in the duke's exclusion upon the sole ground that his political attitude must be held to contravene the Bündnisverträge *(treaty-agreements)* upon which the imperial organization in a measure rests. What, then, are these

1. Prince Albert died September 13th, 1906; he was chosen regent October 21st, 1885. Immediately on his decease a council of regency composed of the president of the local ministry, two associates of the Ministerium, the president of the local assembly (Landtag), and the chairman of the local Appellate Court (Oberlandgericht). This council at once called the legislature together, and that body (September 25th, 1906) unanimously resolved to request a settlement of the succession question by the imperial Bundesrat.

2. "Als Reichskanzler muss ich den Beschluss des Bundesraths vom 2. Juli, 1885—dass die Regierung des Herzogs von Cumberland in Braunschweig mit den Grundprinzipien der Bündnisverträge und der Reichsverfassung unvereinbar ist—so lange als massgebend behandeln, als er nicht durch einen neuen Beschluss des Bundesraths aufgehoben oder abgeändert worden ist," u. s. w. (Berlin despatch to the *New York Staats Zeitung*, Oct. 5, 1906.)

agreements? And why, in a federal state organized upon the basis of a written constitution should primary treaties between the sovereign elements now united to form an empire be appealed to as the ground of an important constitutional decision?

To answer the question is to appreciate the radical difference between such a state (Bundesstaat) as the German Empire and the United States of America viewed in the light of their constituent elements and the plan which unites these to form a new governmental organization. It is to be remembered, in the first place, that the North German Confederation took its constitutional rise in an alliance (Bündnisverträg) concluded August 18, 1866, at the close of the war with Austria, between Prussia and sundry North German states by which a relation offensive and defensive was entered into on the basis of certain outlines (Grundzüge) announced by Prussia on the 10th of June previous for the preservation of the independence and integrity of the contracting sovereignties;[3] this treaty was succeeded in the following year by the formal constitution of the confederation promulgated July 26, 1867. The latter document was subsequently amended by the addition of sundry provisions agreed upon in the late autumn of 1870 at Versailles between the confederate authorities and those of the states south of the River Main,—namely: Baden, Hesse, Wurtenburg, and Bavaria;—and further changed, in consequence of the understanding arrived at early in December following at Berlin between the North German Bundesrat and plenipotentiaries from these other states, by the announcement that thereafter the Bund should be known as the Empire, and its president as German Emperor, Prussia, as before, assuming the position of permanent *Praesidium* of the new imperial alliance. As thus modified it forms the constitution of the *empire,* and was ratified by the governments of the new states thus entering the combination and by the Reichstag at Berlin, and promulgated in April, 1871.[4] In this manner the original Bündnisverträge became transformed into a constitution—(Verfassung),—and while it would seem that the original treaty between the North German states,—among which were Prussia and Brunswick,—must be constitutionally considered as merged in the organic plan subsequently adopted, nevertheless its *spirit* at least is to be

3. Binding, Deutsche Staatsgrundgesetze, (Leipzig, 1904), p. 69-73.

4. Meyer, (Lehrbuch des deutschen Staatsrechts) p. 143, "Die Gründung des deutschen Reichs," gives the clearest account; F. Arndt's brilliant summary in his Verfassung des deutschen Reichs, Einleitung: Errichtung des deutschen Reiches, p. 42, *seq.*

regarded as permanently controlling; with reference to the treaties of November 1870, which directly looked to the incorporation of the South German states with the existing confederation north of the Main and are therefore termed in the parlance of German public law *Verfassungsverträge* it is to be noted that sundry provisions have been *directly* transferred from their texts to that of the present imperial constitution. Thus the organic basis of the empire is seen to present a *treaty* aspect destined to form a determinant element in its construction; in other words, the constitution is to be read not alone in the light of its text but in that of the spirit also of its immediate predecessors. Furthermore, we observe that the body to which a final construction in the case of the Brunswick succession is assigned both by the constitution as well as by the nature of the imperial organization,—itself an expanded confederation and not a union indissoluble resting upon a concrete organic law for its support,—is the high council which represents the combined sovereignty of the allied *states* of the empire,[5] thus linking it in underlying theory to the Congress of the old American Confederation rather than with any organ of the new government planned in 1787. Modern Germany has, indeed, advanced in its political structure far beyond the mere alliance,—Staatenbund,[6]—organized in 1815, although between the present organization and that of the pictur-

5. "Im Bundesrath übt die Gesammtheit der Bundesregierungen die souveräne Reichsgewalt aus. Ihm gebührt deshalb neben der Mitwirkung bei der Reichsgesetzgebung auch ihre Vorbereitung und, soweit sie nicht dem Kaiser besonders zugewiesen ist, ihre Ausführung." (H. L. Grais, Handbuch der Verfassung, p. 17, Berlin, 1906.)

6. Of Bundestaat and Staatenbund much has been written, and yet it seems doubtful whether the leading writers on public law in Germany and England have firmly grasped our American conception of Bundesstaat as a *citizen-union* in the sense expounded by Chief-Justice Marshall when he observed (speaking for the Supreme Court in *McCulloch v. Maryland*, 4 Wheaton, 316, 402-403): "the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states who alone possess supreme dominion. It would be difficult to sustain this proposition," etc.

On the development, in German jurisprudence, of the conceptions in F. H. Rehm in Marquardsen-Seydel's Handbuch des Oeffenlichen Rechts, Vol. I, Allegemeine Staatslehre, p. 86: "Bundesstaat und Staatenbund." The term Staatenbund first appeared in German legal literature when Napoleon formed the Confederation of the Rhine and thus announced the downfall of the Romano-Germanic empire.

esque empire which laid down in 1806 its claims to be the successor of Rome the interval is not so great as that separating the imperial federal state (Bundesstaat) in its ground-plan from the American Union, which latter is likewise a Bundesstaat though built on another foundation. True, the empire is clothed with the attribute of legal personality, it promulgates its own legislation,[7] and, at the command of its sovereign council a recalcitrant member may be constitutionally coerced,[8] while it has, too, a representative assembly chosen by direct vote of the people throughout its states. Despite all this, however, the preponderance of its steel-clad *Praesidium* affords beyond all contestation a stronger guaranty of permanence than the elaborate constitutional structure which has not escaped elements of weakness inherent in every *league,* and which are ever ready to yield on the one hand to the spirit of separatism, or, on the other,—as in the case of Athens and her maritime allies long ago,—to the despotic imperium,— ἀρχη,—of the strongest member. That our own constitutional plan, on the contrary, is one which appeals pre-eminently to the sanctions of *law,* was strikingly shown when a few years since a dispute touching the succession to the highest magistracy in Nebraska was peacefully taken cognizance of by the Supreme Court of the United States,—one only of the justices doubting whether "this court has any jurisdiction to determine a disputed question as to the right to the governorship of a state, however that question may be decided by its authorities.

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7. Arndt, Einleitung, p. 55.

8. By the process termed *Execution,* [Reichsverfassung, article 19.]

"Für die Auslegung der Verfassung ist noch zu beachten, dass sie aus Verträgen (den August [1866] und November-Verträgen [1870] enstanden ist, dass die auf einen Vertrag hinweisenden Bezeichnungen in dem Verfassungstexte zwar noch beibehalten sind, dass sie aber durch die Uebernahme in diesen Text aufgehört haben, Vertragsrecht zu sein und Verfassungsrecht geworden sind. Ist nun das deutsche Reich ein Staatenbund oder ein Bundesstaat? Die Antwort hierauf ist, es ist ein Bundesstaat in dem Sinne, wie dieses Wort von Theorie und Praxis verstanden zu werden pflegte. . . . Hierbei ist jedoch zu beachten, dass die Grenzlinien zwischen Bundesstaat und Staatenbund fliessende sind . . . Wichtiger als manche theoretischen Sätze ist die Präponderanz Preussens nach Ausschliessung Oesterreichs." (Arndt, ibid. p. 54, 55). "Der Staatenbund," says H. L. Grais (Handbuch, p. 9, note 1), "ist ein völkerreichtliches, der Bundesstaat ein staatsrechtliches Gebilde; ersterer bildet ein Rechtsverhältniss, letzterer eine Persönlichkeit.—Staatenbunde waren der deutsche Bund und die Schweiz von 1848, Bundesstaaten sind das Deutsche Reich, die heutige Schweiz und die vereinigten Staaten von Nordamerika."

The ancient term for Switzerland was "land of the oath-bound confederates." B. d. Eigenossen.

9. *Boyd v. Nebraska ex rel. Thayer* (Feb. 1, 1892) 143 U. S. 135, 182.

The fact that one of the qualifications prescribed by the state for its officers—(alluding to the claimed *naturalization* of one of the parties to the cause)—"can only be ascertained and established by considering the provisions of a law of the United States in no respect authorizes an interference by the general government with the state action."[9] But the remaining justices thought the judicial arm of the government constitutionally able to determine such an issue; the operation of an Act of Congress,—a national statute—being drawn in question the highest tribunal of the nation has jurisdiction. Quite another principle is exhibited in the German Bundesrat's position in the case of Brunswick, and also in that of the succession in Lippe some ten years since where the imperial council (denying the competence of the Supreme Court,—Reichsgericht) referred the contestants to a board of *arbitration*—selected from the Reichsgericht judges under the presidency of the King of Saxony. We are here reminded, indeed, of the reference on the part of our old Congress of state boundary-disputes to *commissioners* whose conclusions, however,—signally in the Wyoming case,—lacked an *executive* to carry them out. While Germany has the required power of enforcement under article 19 of its constitution, it is a recalcitrant *state* which may be thus coerced—the members of the empire (Bundesglieder) being the state corporations. These are quite properly made constitutionally amenable to the council (Bundesrat) consisting of instructed delegates from their governments, and it is clearly, too, within the competence of these delegates to control an issue,—such as that raised in the Brunswick case,—where members of the imperial league claim privileges vitally affecting their respective sovereignties. And such would rightly appear to be the Bundesrat's province even were it held that section 76 of the constitution (giving cognizance in state disputes other than those of a private-law nature) does not support the council's jurisdiction. In the Lippe case the jurisdiction seems doubtful, since there the personal qualifications of the throne claimants were contested; in the Brunswick succession it is Prussia's constitutional right to its territorial integrity which the Praesidium holds menaced and the issue thus becomes referable to the primal treaty of the North-German Bund stamping the empire as purely federal both in origin and constitutional organization and not to be identified with a structure national in its conception.

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